

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RUSTY S. WARWICK,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of Social Security,

Defendant.

No. CV-11-0140-FVS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment noted for hearing without oral argument. (ECF No. 16, 19). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Stephanie Lynn F. Kiley represents the Commissioner of Social Security (defendant). After reviewing the administrative record and the briefs filed by the parties, the Court **grants** defendant's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for a period of disability, disability insurance benefits (DIB), and supplemental security income (SSI) on November 27, 2007, alleging disability as of November 1, 2005, due to "fibromyalgia, sleep apnea, hand and neck" (Tr. 104). The applications were denied initially and on reconsideration.

Administrative Law Judge (ALJ) Robert S. Chester held a hearing on October 6, 2009 (Tr. 8-33). The ALJ issued an unfavorable decision on December 1, 2009 (Tr. 497-510). The

1 Appeals Council denied review on February 25, 2011 (Tr. 1-4). The  
2 ALJ's December 2009 decision became the final decision of the  
3 Commissioner, which is appealable to the district court pursuant  
4 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
5 review on April 12, 2011. (ECF Nos. 1 & 4).

6 **STATEMENT OF FACTS**

7 The facts have been presented in the administrative hearing  
8 transcript, the ALJ's decision, and the briefs of the parties.  
9 They are only briefly summarized here.

10 Plaintiff was born on July 7, 1960 and was 45 years old at  
11 the time of the alleged onset date. At the administrative  
12 hearing, Plaintiff testified he was single, had no children, and  
13 lived in his sister's house along with his parents (Tr. 16). His  
14 sole source of income at the time was public assistance (Tr. 16).  
15 Plaintiff attended one year of vocational college and reported he  
16 last worked as a working foreman in field construction (Tr. 16-  
17 17). Plaintiff alleges he stopped working in November of 2005  
18 because of back/neck pain and headaches (Tr. 18).

19 Prior to his July 2006 neck fusion surgery, Plaintiff  
20 described his symptoms as "[s]tiff, popping neck, headaches that  
21 just were completely debilitating" (Tr. 19-20). Plaintiff also  
22 testified he has problems with his knees (Tr. 20). He wears  
23 braces for his knees which he testified "definitely help . . . the  
24 pain" (Tr. 20). Plaintiff stated he had successful surgery on his  
25 right shoulder in 2003 or 2004 and, following that surgery, "was  
26 able to pretty much do any work" (Tr. 21, 23). He indicated,  
27 however, that his left shoulder was now starting to bother him as  
28 well (Tr. 21).

1 Plaintiff indicated he is depressed because he has lost  
2 everything he has ever worked for, he is not able to work and  
3 support himself, he is no longer able to hunt, fish, golf or go  
4 snowmobiling, and his life has come down to living in the basement  
5 of his sister's house and watching TV (Tr. 24). Plaintiff stated  
6 he has difficulty sleeping, getting only about 3 hours of sleep a  
7 night on a good night (Tr. 24-25). Plaintiff testified that on  
8 good days he is able to sit for 1 ½ to two hours, but, on not so  
9 good days, he is only able to sit for 45 minutes to an hour (Tr.  
10 22). He stated he could stand for about 45 minutes to an hour  
11 before needing a break, walk about 1/3 of a mile at one stretch,  
12 and lift a gallon a milk (Tr. 22-23). He indicated he could not  
13 work a full eight-hour workday and would be able to work only two  
14 or three days in a seven-day week (Tr. 26-27).

#### 15 SEQUENTIAL EVALUATION PROCESS

16 The Social Security Act (the Act) defines disability as the  
17 "inability to engage in any substantial gainful activity by reason  
18 of any medically determinable physical or mental impairment which  
19 can be expected to result in death or which has lasted or can be  
20 expected to last for a continuous period of not less than twelve  
21 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
22 provides that a plaintiff shall be determined to be under a  
23 disability only if any impairments are of such severity that a  
24 plaintiff is not only unable to do previous work but cannot,  
25 considering plaintiff's age, education and work experiences,  
26 engage in any other substantial gainful work which exists in the  
27 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
28 Thus, the definition of disability consists of both medical and

1 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
2 (9<sup>th</sup> Cir. 2001).

3 The Commissioner has established a five-step sequential  
4 evaluation process for determining whether a person is disabled.  
5 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
6 is engaged in substantial gainful activities. If so, benefits are  
7 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If  
8 not, the decision maker proceeds to step two, which determines  
9 whether plaintiff has a medically severe impairment or combination  
10 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
11 416.920(a)(4)(ii).

12 If plaintiff does not have a severe impairment or combination  
13 of impairments, the disability claim is denied. If the impairment  
14 is severe, the evaluation proceeds to the third step, which  
15 compares plaintiff's impairment with a number of listed  
16 impairments acknowledged by the Commissioner to be so severe as to  
17 preclude substantial gainful activity. 20 C.F.R. §§  
18 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
19 App. 1. If the impairment meets or equals one of the listed  
20 impairments, plaintiff is conclusively presumed to be disabled.  
21 If the impairment is not one conclusively presumed to be  
22 disabling, the evaluation proceeds to the fourth step, which  
23 determines whether the impairment prevents plaintiff from  
24 performing work which was performed in the past. If a plaintiff  
25 is able to perform previous work, that plaintiff is deemed not  
26 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
27 this step, plaintiff's residual functional capacity (RFC) is  
28 considered. If plaintiff cannot perform past relevant work, the

1 fifth and final step in the process determines whether plaintiff  
2 is able to perform other work in the national economy in view of  
3 plaintiff's residual functional capacity, age, education and past  
4 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);  
5 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

6 The initial burden of proof rests upon plaintiff to establish  
7 a *prima facie* case of entitlement to disability benefits.  
8 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
9 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
10 met once plaintiff establishes that a physical or mental  
11 impairment prevents the performance of previous work. The burden  
12 then shifts, at step five, to the Commissioner to show that (1)  
13 plaintiff can perform other substantial gainful activity and (2) a  
14 "significant number of jobs exist in the national economy" which  
15 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
16 Cir. 1984).

#### 17 STANDARD OF REVIEW

18 Congress has provided a limited scope of judicial review of a  
19 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
20 the Commissioner's decision, made through an ALJ, when the  
21 determination is not based on legal error and is supported by  
22 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
23 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
24 1999). "The [Commissioner's] determination that a plaintiff is  
25 not disabled will be upheld if the findings of fact are supported  
26 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
27 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
28 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d

1 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
2 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989).  
3 Substantial evidence "means such evidence as a reasonable mind  
4 might accept as adequate to support a conclusion." *Richardson v.*  
5 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch  
6 inferences and conclusions as the [Commissioner] may reasonably  
7 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,  
8 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers  
9 the record as a whole, not just the evidence supporting the  
10 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
11 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526  
12 (9<sup>th</sup> Cir. 1980)).

13 It is the role of the trier of fact, not this Court, to  
14 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
15 evidence supports more than one rational interpretation, the Court  
16 may not substitute its judgment for that of the Commissioner.  
17 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
18 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
19 substantial evidence will still be set aside if the proper legal  
20 standards were not applied in weighing the evidence and making the  
21 decision. *Browner v. Secretary of Health and Human Services*, 839  
22 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
23 evidence to support the administrative findings, or if there is  
24 conflicting evidence that will support a finding of either  
25 disability or nondisability, the finding of the Commissioner is  
26 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
27 1987).

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**ALJ'S FINDINGS**

The ALJ determined that plaintiff meets the insured status requirements of the Act through December 31, 2010 (Tr. 499). At step one, the ALJ found plaintiff has not engaged in substantial gainful activity since November 1, 2005, the alleged onset date (Tr. 499). At step two, the ALJ found plaintiff had severe impairments of "status post fusion of the cervical spine, status post repair of the right shoulder, status post left carpal tunnel release, fibromyalgia, obesity, adjustment disorder with mixed anxiety and depression, personality disorder, not otherwise specified, and pain disorder with psychological factors and general medical condition" (Tr. 499). The ALJ evaluated the medical evidence of record (Tr. 499-505) and concluded, at step three, that plaintiff's impairments, alone and in combination, did not meet or medically equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Tr. 505). The ALJ then assessed plaintiff's RFC and determined plaintiff could perform light work; could occasionally climb ramps or stairs but should never climb ladders, ropes and scaffolds; could occasionally engage in stooping, kneeling, crouching, crawling, or overhead reaching with the bilateral upper extremities; should avoid concentrated exposure to vibration and hazards such as unprotected heights or moving machinery; is capable of simple and some detailed tasks; is able to follow one and two step instructions, but sustained concentration would be episodically disrupted by his perception of pain; would do best in jobs with only occasional contact with the general public; and is capable of superficial contact with supervisors and coworkers (Tr. 506).

1 With respect to plaintiff's credibility, the ALJ stated that  
2 plaintiff's medically determinable impairments could reasonably be  
3 expected to cause the alleged symptoms; however, plaintiff's  
4 statements concerning the intensity, persistence and limiting  
5 effects of the symptoms were not credible to the extent they were  
6 inconsistent with the ALJ's RFC assessment (Tr. 507). At step  
7 four, the ALJ found that plaintiff is not capable of performing  
8 his past relevant work as a construction worker I, millwright, and  
9 combination welder (Tr. 508-509). However, at step five, the ALJ  
10 determined that based on the vocational expert testimony and  
11 plaintiff's age, education, work experience, and RFC, there are  
12 jobs that exist in significant numbers in the national economy  
13 that plaintiff could perform, including the jobs of production  
14 assembler, cleaner I, and mail clerk (Tr. 509-510). Accordingly,  
15 the ALJ concluded that plaintiff was not disabled as defined by  
16 the Act from November 1, 2005, through the date of his decision,  
17 December 1, 2009 (Tr. 510).

#### 18 ISSUES

19 Plaintiff alleges the ALJ erred as follows:

- 20 1. The ALJ erroneously determined that plaintiff's  
21 impairments did not meet or medically equal the listings  
at 1.04A;
- 22 2. The ALJ erred by failing to accord weight to the  
23 opinions of Carol Miller, ARNP, regarding plaintiff's  
physical condition;
- 24 3. The ALJ erred by failing to accord weight to the opinion  
25 of W. Scott Mabey, Ph.D., regarding plaintiff's mental  
limitations; and
- 26 4. The ALJ erred by failing to provide specific, clear and  
27 convincing reasons for finding plaintiff's testimony not  
fully credible

28 (ECF No. 17 at 9-15).



## DISCUSSION

### A. Plaintiff's Credibility

Plaintiff asserts that the ALJ erred by failing to properly consider plaintiff's testimony regarding his limitations. (ECF No. 17 at 13-15). Plaintiff specifically argues that the ALJ failed to state the required specific, clear and convincing reasons to reject plaintiff's hearing testimony.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

As noted above, the ALJ found that plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that plaintiff's statements concerning the intensity, persistence and limiting effects of the symptoms were not credible to the extent they were inconsistent with the ALJ's RFC assessment (Tr. 507). The ALJ determined plaintiff retained

1 the RFC to perform light exertion level work; could occasionally  
2 climb ramps or stairs but should never climb ladders, ropes and  
3 scaffolds; could occasionally engage in stooping, kneeling,  
4 crouching, crawling, or overhead reaching with the bilateral upper  
5 extremities; should avoid concentrated exposure to vibration and  
6 hazards such as unprotected heights or moving machinery; is  
7 capable of simple and some detailed tasks; is able to follow one  
8 and two step instructions, but sustained concentration would be  
9 episodically disrupted by his perception of pain; would do best in  
10 jobs with only occasional contact with the general public; and is  
11 capable of superficial contact with supervisors and coworkers (Tr.  
12 506).

13 With regard to plaintiff's specific complaint that the ALJ's  
14 RFC determination did not account for plaintiff's testimony that  
15 "since his surgery" he continued to have a stiff neck with  
16 popping, headaches, and tremendous pain (ECF No. 17 at 13),  
17 plaintiff actually testified that "in 2005", before his neck  
18 surgery, his symptoms were "[s]tiff, popping neck, headaches that  
19 just were completely debilitating" (Tr. 19-20). Plaintiff did not  
20 undergo neck fusion surgery until July 2006 (Tr. 199-201).  
21 Medical records from the surgeon, Cynthia Hahn, M.D., indicate  
22 that post neck fusion surgery, plaintiff's neck felt good, his  
23 neck was not really bothering him and the headaches which he had  
24 prior to the surgery had gone away (Tr. 186-188). In March 2009,  
25 Carol Miller, ARNP, noted that his neck surgery "nicely resolved"  
26 (Tr. 450).

27 Plaintiff testified at the administrative hearing that his  
28 impairments prevented him from working a full eight-hour workday

1 and from working a full workweek (Tr. 26-27). He stated that on  
2 good days he is able to sit for only 1 ½ to two hours, but, on not  
3 so good days, he could only sit for 45 minutes to one hour (Tr.  
4 22). He indicated he could stand for only about 45 minutes to an  
5 hour before needing a break, walk about 1/3 of a mile at one  
6 stretch, and lift a gallon a milk (Tr. 22-23). The ALJ noted that  
7 this level of limitation is not supported by the evidence of  
8 record (Tr. 507). The undersigned agrees.

9 As indicated by the ALJ, treatment records reflect that  
10 plaintiff's condition is generally stable except when he over does  
11 it, such as when he is attempting to do some construction-type  
12 jobs for his father as an apartment manager or shoveling snow (Tr.  
13 507, 440, 433, 426, 424-425, 334). In fact, Ms. Miller opined in  
14 December 2006 that plaintiff could work at a job where the  
15 physical demands are less than his prior job requirements (Tr.  
16 306), advised plaintiff in September 2008 to obtain some type of  
17 work (Tr. 430), and encouraged plaintiff in October 2008 to remain  
18 as active as possible (Tr. 433). The ALJ further notes that x-  
19 rays of plaintiff's neck and knee have displayed only minimal  
20 findings (Tr. 508). The medical evidence of record does not  
21 reflect the level of limitation plaintiff reported at the  
22 administrative hearing.

23 Plaintiff's daily activities are also inconsistent with his  
24 allegations of disabling limitations. *Fair v. Bowen*, 885 F.2d  
25 597, 603 (9<sup>th</sup> Cir. 1989) (it is well-established that the nature  
26 of daily activities may be considered when evaluating  
27 credibility). Plaintiff was noted to have been "up on ladder  
28 cleaning out gutters" (Tr. 434), lifting a garage door (Tr. 429),

1 assisting with a move (Tr. 426), shoveling snow (Tr. 332, 440),  
2 and helping his father as an apartment manager. The ALJ notes  
3 evidence that plaintiff took his mother to appointments, helped  
4 care for cats, could cook simple meals, could do his own laundry,  
5 drove a car, shopped, paid his own bills, and spent time watching  
6 television (Tr. 508). The ALJ also indicated the record shows  
7 that plaintiff reported walking the dog, working on increasing his  
8 exercise, and trying to walk 1/2 to 1 mile a day (Tr. 446, 452,  
9 456, 504). On June 11, 2009, plaintiff reported to Ms. Miller  
10 that he was exercising daily by walking the dog about 1/3 mile, no  
11 matter how he felt (Tr. 459, 504). This level of activity is not  
12 consistent with plaintiff's testimony regarding his limitations.

13 It also appears that plaintiff has been noncompliant with  
14 physical therapy demands. Noncompliance with medical care or  
15 unexplained or inadequately explained reasons for failing to seek  
16 medical treatment cast doubt on a claimant's subjective  
17 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885  
18 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). A June 15, 2009 report from Apex  
19 Physical Therapy reveals that plaintiff was being discharged from  
20 active services "primarily due to his propensity toward no shows .  
21 . . in addition to the fact that he has improved with [activities  
22 of daily living]" (Tr. 487-488).

23 After reviewing the record, the undersigned finds that the  
24 reasons provided by the ALJ for discounting plaintiff's subjective  
25 complaints are clear, convincing, and fully supported by the  
26 record. Accordingly, the ALJ did not err by concluding that  
27 plaintiff's subjective complaints regarding the extent of his  
28 functional limitations were not fully credible in this case.

1 **B. Physical Limitations**

2 Plaintiff contends that the ALJ erred by finding he has the  
3 RFC to perform a range of light exertion level work activity.  
4 (ECF No. 17 at 10-11). Plaintiff indicates that the opinions of  
5 Ms. Miller reflect that he has greater restrictions from a  
6 physical standpoint than those assessed by the ALJ. He argues  
7 that the ALJ failed to set forth the requisite specific and  
8 legitimate reasons supported by substantial evidence in the record  
9 for rejecting Ms. Miller's opinions.

10 Ms. Miller filled out a physical evaluation form on December  
11 28, 2006 (Tr. 300-303). Ms. Miller noted that plaintiff's  
12 impairments were moderate and opined that plaintiff would be  
13 restricted to sedentary exertion level work (Tr. 301). However,  
14 Ms. Miller indicated that she expected plaintiff's overall  
15 limitations on work activities to continue for less than 90 days<sup>1</sup>  
16 (Tr. 303). Moreover, Ms. Miller has never opined that plaintiff  
17 is not able to work. In fact, as noted above, Ms. Miller opined  
18 in December 2006 that plaintiff could work at a job where the  
19 physical demands are less than his prior job requirements (Tr.  
20 306), advised plaintiff in September 2008 to obtain some type of  
21 work (Tr. 430), and encouraged plaintiff in October 2008 to remain  
22 as active as possible (Tr. 433).

23 As noted by defendant, Ms. Miller is also not an acceptable  
24 medical source. (ECF No. 20 at 12). Only licensed physicians and  
25 certain other qualified specialists are considered "acceptable  
26

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27 <sup>1</sup>The limitations assessed by Ms. Miller would thus not meet  
28 the duration requirements of the Act (one year). 42 U.S.C. §  
1382c(a)(3)(A).

1 medical sources" under the Social Security regulations. See 20  
2 C.F.R. §§ 404.1513, 416.913. Nurses are defined as "other  
3 sources" and are not entitled to the same deference. On April 29,  
4 2008, state agency reviewing physician, Norman Staley, M.D., an  
5 acceptable medical source, affirmed a February 7, 2008 RFC  
6 assessment which limited plaintiff to a restricted range of light  
7 exertion level work (Tr. 376-383, 411). The record does not  
8 support a more restrictive finding than Plaintiff being restricted  
9 to a range of light exertion level work.

10 Based on the foregoing, it was appropriate for the ALJ to  
11 reject Ms. Miller's opinion that plaintiff's physical abilities  
12 limited him to sedentary exertion level work. The undersigned  
13 finds that the ALJ's physical RFC determination is in accord with  
14 the weight of the record evidence and free of legal error.

15 **C. Listing 1.04A**

16 Plaintiff contends that the ALJ erred at step three of the  
17 sequential evaluation process. (ECF No. 17 at 9-10). Plaintiff  
18 specifically asserts that his spinal disorder meets the criteria  
19 of section 1.04A of the Listing of Impairments.

20 The claimant bears the burden of establishing that his  
21 impairments satisfy the requirements of a Listings impairment.  
22 *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9<sup>th</sup> Cir. 1999); *see*,  
23 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). To satisfy this  
24 burden, plaintiff must prove that his impairments "meet *all* of the  
25 specified medical criteria. An impairment that manifests only  
26 some of those criteria, no matter how severely, does not qualify."  
27 *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990).

1 At step three, the ALJ considered Listing 1.00 and concluded  
2 that plaintiff's impairments did not medically meet or equal the  
3 criteria for this Listing (Tr. 505). The ALJ stated that  
4 plaintiff does not show the findings on examination required for  
5 disability to be predicated upon medical considerations alone (Tr.  
6 505). The undersigned agrees.

7 Listing 1.04 deals with disorders of the spine (e.g.,  
8 herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis,  
9 osteoarthritis, degenerative disc disease, facet arthritis,  
10 vertebral fracture), resulting in compromise of a nerve root or  
11 the spinal cord. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04.  
12 Listing 1.04A requires an impairment that results in: "Evidence of  
13 nerve root compression characterized by neuro-anatomic  
14 distribution of pain, limitation of motion of the spine, motor  
15 loss (atrophy with associated muscle weakness or muscle weakness)  
16 accompanied by sensory or reflex loss and, if there is involvement  
17 of the lower back, positive straight-leg raising test (sitting and  
18 supine)." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04A.

19 As noted by defendant (ECF No. 20 at 8-9), the record does  
20 not demonstrate that plaintiff's spinal impairment caused nerve  
21 root compression (Tr. 203 (September 2006 cervical spine file  
22 showed stable fusion, disc and body heights unchanged)); (Tr. 206  
23 (March 2006 cervical spine MRI revealed plaintiff's spinal cord  
24 was not affected at C4-5 or C6-7 and that plaintiff's mild  
25 posterior disc bulge slightly flattening the right surface of the  
26 cord, but was not found to cause compression)); (Tr. 204 (April  
27 2006 cervical spine x-rays showed moderate degenerative disc  
28 disease slight end plate spurring, which narrowed the neural

1 foramina, but no other stenosis was seen)); (Tr. 364-365  
2 (neurosurgeon Dr. Hahn opined in June 2006 that plaintiff did not  
3 have spinal cord compression)). In September 2008, after  
4 plaintiff was hit in the head by a garage door, x-rays of the  
5 cervical spine did not show acute changes and fusion was intact  
6 (Tr. 431).

7 Plaintiff has also not demonstrated, nor does the record  
8 reflect, that plaintiff's spinal impairment caused neuro-anatomic  
9 distribution of pain. Dr. Hahn attributed plaintiff's hand  
10 numbness more to his carpal tunnel syndrome than his cervical  
11 spine issues (Tr. 364-365).

12 While there is evidence that plaintiff experienced limitation  
13 of motion of the spine, the record does not reflect that the  
14 limitation was significant after his July 2006 spinal fusion (Tr.  
15 453 (April 2009 normal cervical mobility)); (Tr. 450 (March 2009  
16 mildly reduced cervical range of motion)); (Tr. 429 (September  
17 2008 range of motion intact)); (Tr. 406 (February 2008 neck  
18 described as supple with full range of motion and no pain)); (Tr.  
19 265-266 (October 2007 mildly reduced range of motion in his  
20 cervical spine)).

21 Lastly, Plaintiff has not demonstrated, and the record does  
22 not reflect, motor loss accompanied by sensory or reflex loss.

23 Based on the foregoing, the undersigned finds that plaintiff  
24 has not met his burden at step three with respect to Listing  
25 1.04A. The ALJ's step three determination is supported by  
26 substantial evidence and free of legal error.

27 ///

28 ///



1 **D. Psychological Limitations**

2 Plaintiff asserts that limitations assessed by W. Scott  
3 Mabee, Ph.D., reflect greater restrictions from a psychological  
4 standpoint than assessed by the ALJ, and the ALJ erred by not  
5 according Dr. Mabee's reports greater weight. (ECF No. 17 at 11-  
6 13). Plaintiff argues that the ALJ failed to set forth specific  
7 and legitimate reasons supported by substantial evidence in the  
8 record for rejecting Dr. Mabee's opinions. (ECF No. 17 at 13).

9 The ALJ determined that plaintiff was able to follow one and  
10 two step instructions and perform simple and some detailed tasks,  
11 but that sustained concentration would be episodically disrupted  
12 by plaintiff's perception of pain, he would do best in jobs with  
13 only occasional contact with the general public and only  
14 superficial contact with supervisors and coworkers (Tr. 506).  
15 Contrary to plaintiff's argument, this mental RFC determination  
16 does not deviate to a great extent from the findings of Dr. Mabee.

17 On January 17, 2007, Dr. Mabee completed a psychological  
18 evaluation of plaintiff (Tr. 290-298). Dr. Mabee diagnosed  
19 personality disorder associated with both psychological factors  
20 and a general medical condition; adjustment disorder with mixed  
21 anxiety and depressed mood, chronic; and personality disorder with  
22 dependant features (Tr. 296). He also gave plaintiff a current  
23 GAF score of 60<sup>2</sup> (Tr. 297). With regard to barriers to  
24 employment, Dr. Mabee indicated plaintiff may have a mild amount  
25 of social difficulties, should be able to understand and follow  
26

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27 <sup>2</sup>A GAF of 60-51 reflects: Moderate symptoms or moderate  
28 difficulty in social, occupational, or school functioning. See  
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 simple as well as complex verbal and written instructions, and  
2 does not appear to have difficulty focusing and sustaining  
3 concentration and memory (Tr. 297). Dr. Mabee opined that  
4 plaintiff's pace and persistence would be average, but his ability  
5 to focus and complete tasks would likely be negatively impacted if  
6 he is experiencing pain (Tr. 297). Dr. Mabee also believed  
7 plaintiff's ability to reason and use appropriate judgment  
8 appeared average, but he may have some moderately serious  
9 difficulties navigating in a typical work environment (Tr. 297).  
10 Dr. Mabee checked boxes on a form<sup>3</sup> indicating plaintiff had marked  
11 limitations in his ability to perform routine tasks and to respond  
12 appropriately to and tolerate the pressures and expectations of a  
13 normal work setting and severe limitations in his ability to  
14 control physical or motor movements and maintain appropriate  
15 behavior (Tr. 292).

16 On November 13, 2007, Dr. Mabee completed a second evaluation  
17 of plaintiff (Tr. 255-264). Other than opining that plaintiff's  
18 abilities to exercise judgment and make decisions and to respond  
19 appropriately to and tolerate the pressures and expectations of a  
20 normal work setting were markedly impaired, all previously  
21 assessed functional limitations were determined to be no greater  
22 than moderately impaired (Tr. 257). Plaintiff's current GAF score  
23 was increased to 60 to 65<sup>4</sup> (Tr. 261). Dr. Mabee reported that he

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24  
25 <sup>3</sup>A check-box form is entitled to little weight. *Crane v.*  
26 *Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996).

27 <sup>4</sup>A GAF of 70-61 is characterized as: "Some mild symptoms or  
28 some difficulty in social, occupational, or school functioning,  
but generally functioning pretty well." DIAGNOSTIC AND STATISTICAL  
MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 believed plaintiff would not have a difficult time understanding  
2 and following simple verbal and written instructions, but may have  
3 more difficulty with complex directions (Tr. 262). It was further  
4 assessed that plaintiff's pace and persistence would be average  
5 when given a simple task and his ability to reason and use  
6 appropriate judgment appeared fair, but he would still have a  
7 difficult time functioning in a typical work environment (Tr.  
8 262).

9       Since Dr. Mabee's narrative report and assessed GAF scores  
10 account for only mild and moderate limitations, Dr. Mabee's  
11 account on check-box forms of marked and severe functional  
12 limitations is internally inconsistent. Moreover, the record  
13 evidence of plaintiff's reported activities of daily living also  
14 contradict the assessment of marked and severe functional  
15 limitations. *See supra*. Other than the notations of marked and  
16 severe limitations, the restrictions discussed by Dr. Mabee do not  
17 differ to a great extent from those determined by the ALJ.

18       The findings of state agency physician, James Bailey, Ph.D.,  
19 who reviewed the record, including the two evaluations completed  
20 by Dr. Mabee, mirrors the ALJ's mental RFC determination (Tr. 384-  
21 400). Dr. Bailey determined plaintiff had mild limitations in  
22 activities of daily living and in maintaining concentration,  
23 persistence and pace, a moderate limitation in maintaining social  
24 functioning, and no episodes of decompensation (Tr. 394). Dr.  
25 Bailey opined plaintiff was moderately limited in his abilities to  
26 maintain attention and concentration for extended periods, to work  
27 in coordination with or proximity to others without being  
28 distracted by them, to interact appropriately with the general

1 public and to get along with coworkers or peers without  
2 distracting them or exhibiting behavioral extremes (Tr. 398-399).  
3 Dr. Mabee's opinion is not inconsistent with the findings of Dr.  
4 Bailey, other than the marked and severe functional limitations  
5 noted on the check-box forms.

6 It is the role of the trier of fact, not this Court, to  
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
8 evidence supports more than one rational interpretation, the Court  
9 may not substitute its judgment for that of the Commissioner.  
10 *Tackett*, 180 F.3d at 1097. If there is substantial evidence to  
11 support the administrative findings, or if there is conflicting  
12 evidence that will support a finding of either disability or  
13 nondisability, the finding of the Commissioner is conclusive.  
14 *Sprague*, 812 F.2d at 1229-1230.

15 Substantial evidence supports the ALJ's mental RFC  
16 determination in this case. Consequently, the Court must not  
17 second guess the Commissioner's finding in this regard. It was  
18 not error for the ALJ to reject Dr. Mabee's assessment of marked  
19 and severe mental limitations.

#### 20 CONCLUSION

21 Having reviewed the record and the ALJ's conclusions, the  
22 Court finds that the ALJ's decision is free of legal error and  
23 supported by substantial evidence. Accordingly,

#### 24 IT IS HEREBY ORDERED:

25 1. Defendant's Motion for Summary Judgment (**ECF No. 19**) is  
26 **GRANTED.**

27 2. Plaintiff's Motion for Summary Judgment (**ECF No. 16**) is  
28 **DENIED.**

S/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge